

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

JANUARY TERM, 1911.

No. 2256.

801

EMMA L. HILTON, APPELLANT,

vs.

GEORGE E. RACKEY, LIZZIE RACKEY, AND MARY B.
DARMSTEAD.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED DECEMBER 17, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 2256.

EMMA L. HILTON, Appellant,
vs.
GEORGE E. RACKEY et al.

a Supreme Court of the District of Columbia.

Equity. No. 28881.

GEORGE E. RACKEY, MARY B. DARMSTEAD, LIZZIE RACKEY, Com-
plainants,
vs.
EMMA L. HILTON, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill for Partition.*

Filed October 23, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28881.

GEORGE E. RACKEY, MARY B. DARMSTEAD, LIZZIE RACKEY, Com-
plainants,
vs.
EMMA L. HILTON, Defendants.

To the Honorable Justices of the Supreme Court of the District of Columbia, holding an Equity Court:

The bill of complaint of George E. Rackey, Mary B. Darmstead and Lizzie Rackey, respectfully represents to the Court as follows:

1. That all the complainants are citizens of the United States,

and residents of the District of Columbia, and are of full age, and bring this suit in their own right as hereinafter set forth.

2. The defendant, Emma L. Hilton, is a citizen of the United States, and a resident of the District of Columbia, and is of full age, and is sued in her own right as hereinafter set forth.

3. That Henry Rackey, of the City of Washington, District of Columbia, owner of the property described in this bill for partition, was a citizen of the United States and a resident of the District of Columbia, and died in the City of Washington, District of Columbia, on the 23rd day of June, 1908, intestate, and leaving as his only heirs at law, his five children, namely, William H. Rackey, George E. Rackey, Maurice H. Rackey, Emma L. Hilton, and Mary B. Darmstead, and leaving also a widow, Lizzie Rackey, who is named as one of the complainants in this bill.

4. The said George E. Rackey purchased all the interest of his brother, William H. Rackey in the real estate hereinafter described, and the said Lizzie Rackey, widow of the intestate, purchased all the interest of her son, Maurice H. Rackey, in the property hereinafter described, so that the said real estate is now owned in fee simple by the parties named as complainants and defendant to this bill for partition.

5. That the said Henry Rackey, who died intestate as aforesaid, was, at the time of his death, seized in fee simple, and in his own right, of the following parcels of land situated in the City of Washington, District of Columbia, to wit:

Lots 14, 15, 16, 17 and 18, in square 1201, being land conveyed to Henry Rackey as Henry Rickey, by deed from Henrietta Stewart, dated October 24th, 1881, and recorded in Liber 987, at folio 157, et seq. of the land records of the District of Columbia.

Also part of lot 7, in said square 1201, being 1,450 feet of back ground.

Also the south 50 feet of lot 13 in square 1201.

Also the east 13 feet of lot 11 in square 1201.

Also the north 12 feet of lot 10 in square 1201.

Also part of lot 11, square 1201, known as back ground, containing 3,000 square feet of land.

Also part of lot 201 in square 1201 being 782 Sq. ft. of background.

Also part of lot 12, in said square 1201, containing 3,000 square feet of back ground, the said parts of lots 7, 11 and 12, being the land conveyed to Henry Rackey by George W. King and wife by deed dated March 8th, 1893, and recorded in Liber 1788, at folio 201, which last deed was confirmed in part by deed from Ellen Maher recorded in Liber 3149, at folio 150 et seq. of the Land Records of the District of Columbia.

6. That said real estate is improved by small dwelling houses, and the whole is assessed at \$8,555.00, and is of the value of about \$15,000., and all but one of said dwelling houses are under rental, and it will be necessary for the Court to appoint some fit person to collect the rents and manage the said property during the pendency of this suit.

7. That said real estate is not capable of partition in kind, and in order to effect partition, the same will have to be sold and the proceeds of sale divided among the parties entitled thereto according to their respective interests.

8. That by deed dated July 11th, 1908, and recorded July 22nd, 1909, in Liber 3249, at folio 494, of the land records of the District of Columbia, William H. Rackey, George E. Rackey, Maurice H. Rackey, Emma L. Hilton and Mary B. Darmstead, sole heirs at law

4 and children of the said Henry Rackey conveyed to the said Lizzie Rackey widow of the intestate Henry Rackey, in lieu of her dower, a full one third fee simple interest in the real estate hereinbefore described, and the said Lizzie Rackey has since purchased an undivided interest of the said Maurice H. Rackey, as will appear by reference to deed recorded on the 22nd day of March, 1909, in Liber 3219, at folio 64, one of the land records of the District of Columbia, and the said George E. Rackey has purchased the undivided interest of his brother, William H. Rackey in said land, as will appear by reference to deed recorded May 13th, 1909, in liber 3232, at folio 254, of the Land Records of the District of Columbia, and the aforesaid real estate is therefore owned by the parties to this bill whose undivided shares are as follows:

Lizzie Rackey	7/15ths.
George E. Rackey	4/15ths.
Mary B. Darmstead	2/15ths.
Emma L. Hilton	2/15ths.

Wherefore, the premises considered, your complainants pray:

1st. That process may issue against the said defendant, requiring her to answer the allegations of this bill of complaint, but without oath, answer under oath being hereby expressly waived.

2nd. That the real estate hereinbefore described may be sold and after paying the costs of said suit, and their expenses in the premises, that the proceeds arising from said sale shall be divided between the parties to this suit according to their respective interests.

5 3rd. That a receiver be appointed to manage the said real estate and collect the rents, issues and profits thereof during the pendency of this suit.

4th. That the Court may grant such other and further and general relief as the nature of the case may require, and as to Equity shall seem meet.

The only defendant to this bill is Emma L. Hilton.

GEORGE E. RACKEY.
LIZZIE RACKEY.
MARY B. DARMSTEAD.

I, George E. Rackey, upon oath say that I have read the foregoing petition by me subscribed and know the contents thereof, and that the matters and things therein stated as of my personal knowledge are true, and those stated upon information and belief I believe to be true.

GEORGE E. RACKEY.

Subscribed and sworn to before me this 21st day of October, 1909.

[SEAL.]

WM. H. HOLLAWAY,
Notary Public, D. C.

CRANDAL MACKEY,
Solicitor for Complainants.

Answer of Emma L. Hilton.

Filed November 4, 1909.

* * * * *

6 The answer of the defendant Emma L. Hilton respectfully represents.

1 and 2. She admits as true the allegations of the first and second paragraphs of said bill.

3. She admits as true the allegations of the third paragraph of said bill.

4. She is informed that the allegations contained in the fourth paragraph are true and admits the same.

5. She admits the allegations of the fifth paragraph to be true.

6. In answer to the sixth paragraph of said bill she admits that said real estate is improved by dwelling houses which are under rental as alleged; and she is informed that the said property is assessed at about \$8,000, but as to its market value she is not informed. She admits that it is advisable that some fit person be authorized to collect the rents during the pendency of this suit.

7. She admits the allegations of the seventh paragraph of said bill to be true.

8. She denies that by deed recorded in Liber 3249 at folio 494 this defendant with the other persons mentioned in said paragraph conveyed a full one third fee simple interest in said real estate to the said plaintiff Lizzie Rackey in lieu of her dower and says that the provisions of said deed have expired by the limitations of said deed and that the considerations for the making of said deed so far as the real estate is concerned have failed. And she denies that she is entitled to only 2/15 of said real estate, but is entitled and claims the full interest devolved upon her by the law.

EMMA L. HILTEN.

Replication.

Filed November 11, 1909.

* * * * *

The plaintiffs hereby join issue with the defendant.

CRANDAL MACKEY,
Solicitor for Plaintiffs.

Deposition of George E. Rackey for Complainant.

Filed November 24, 1909.

* * * * *

WASHINGTON, D. C., November 10, 1909—
Wednesday at 3 o'clock p. m.

Met, pursuant to agreement, at the office of Crandal Mackey, Esq., in the Columbian Building, for the purpose of taking testimony as to the market value of the property described in the above entitled cause.

Present on behalf of the complainants, Crandal Mackey, Esq.

Present on behalf of the respondent, James E. Padgett Esq.

* * * * *

8 Thereupon GEORGE ERNEST RACKEY, one of the complainants, being first duly sworn according to law, to testify the whole truth, and nothing but the truth relating to the cause at issue, was examined and testified as follows:

Direct examination.

By Mr. MACKEY:

Q. Mr. Rackey, state your full name, residence and occupation?

A. George Ernest Rackey; age 27 years; residence 3729 M Street, northwest, this City.

Q. What is your occupation? A. Salesman.

Q. Will you state what relation you bore to the late Henry Rackey, deceased? A. I am his son—one of his sons.

Q. You are the George E. Rackey named in the suit in Equity filed in the Supreme Court of the District of Columbia, No. 28,881, in which George E. Rackey and others are complainants, and Emma L. Hilton is the defendant? A. Yes, sir, I am.

Q. When and where did your father, Henry Rackey die? A. He died the 23rd of June, 1908 at No. 3729 M Street Northwest, Washington, D. C.

Q. Will you state whether your father left a will? A. No, sir; he did not leave a will.

Q. Will you state whether or not your father left a widow?

9 A. Yes, sir, he did.

Q. What is her full name, and whether or not she is living? A. Her name is Lizzie Rackey, and she is my father's widow; she is living at No. 3729 M Street, Northwest, Washington, D. C.

Q. Will you state what children were living at the time of the death of your father, Henry Rackey? A. There were five children living at the time he died.

Q. Name them? A. William H. Rackey, Emma L. Hilton, Mary B. Darmstead, and George Earnest Rackey, and Maurice H. Rackey.

Q. Were any other children or the descendents of any children, living at the time of your father's death besides these five you have

mentioned? A. These are the only children, and they are the only heirs at law of my father. There were no children of any deceased child of my father living at the time of his death.

Q. Will you state as fully as you can, the names and location of all the real estate owned by your father Henry Rackey at the time of his death? A. My father, at the time of his death, owned the property that you have described in paragraph 5, of the bill of complaint in this case. Among my father's papers I found deeds to the property described in the bill of complaint which property I knew he still owned at the time of his death. One of these deeds is dated

October 24th, 1881, and is recorded in Liber 987, at folio 10 157, et seq., in the office of the Recorder of the District of Columbia, and is a deed from Henrietta Stewart to my father under the name of Henry Rickay, and conveys to him all those parts of lots numbered 8, 9 and 201, in Deakins and Bailey's Addition to Georgetown, District of Columbia as subdivided by F. W. Jones, trustee, and recorded in the Surveyor's office of the District of Columbia, being lots numbered 14, 15, 16, 17, and 18, and being the same premises which were conveyed by F. W. Jones, trustee, to the said Henrietta Stewart, as per deed recorded in Liber No. 980, of said land records.

This property is located in square 1201, in the city of Washington, District of Columbia, formerly square 31.

My father also owned at the time of his death, and I find among his papers, a deed dated March 20th, 1889, and recorded in Liber 1371, at folio 404, et seq. of the land Records of the District of Columbia, from George W. Casilear and wife, to Henry Rackey, to land known as parts of lots numbered 7, 11 and 12, in Deakins and Bailey's Addition to Georgetown, District of Columbia, the land being described as follows:

Beginning at a point in the west line of lot 12, seventy feet from the south line of Prospect Street, and running thence with said west line 50 feet; thence easterly and parallel with Prospect Street 165 feet; thence north and parallel to the first line 50 feet and thence westerly 165 feet to the beginning.

My father also owned at the date of his death, land conveyed to him on March 8th, 1893, by deed recorded in Liber 1788, at folio 201, et seq., being the land conveyed by George W. King and wife, and being parts of lots 10 and 13, in Deakins and 11 Bailey's Addition to Georgetown, being in square 31, now known as square 1201, of the city of Washington, District of Columbia, and described as follows:

Beginning on the east side of College street at a point distant seventy feet south from the south line of Prospect street, and running thence south on said east line of College street sixty two feet more or less to the north line of the Canal Road; thence east along the north line of said Canal Road sixty feet more or less to the east line of lot ten (10); thence north along said east line of lot ten (10) to a point seventy (70) feet south from the south line of Prospect Street, where a post is now planted; thence due west sixty (60) feet to the place of beginning, being the land acquired by said George W. King by

deeds from the commissioners of the District of Columbia, recorded in Liber 1549, at folio 328, 330 and 332.

The property conveyed by this deed from George W. King and wife was subsequently conveyed to my father on April 29th, 1908, by Ellen Maher by deed recorded in Liber 3149 at folio 150 et seq.

Q. Did your father own any real estate other than that described in the deed you have just referred to? A. No, sir.

Mr. MACKEY: I offer in evidence the deeds described by the witness, four in number, and referred to in his testimony, and ask the Examiner to mark them as exhibits.

NOTE.—Deeds referred to put in evidence and marked “Complainants’ exhibits A, B, C and D.”

Mr. MACKEY: I also offer in evidence the original of those deeds in the office of the Recorder of Deeds of the District of Columbia.

NOTE.—Deeds referred to put in evidence by counsel for the complainant.

Q. Will you state how long your father was in possession of the various parcels of property that you have described? A. My father was in possession of all the property described from the dates of the respective deeds to said property, and was continuously in possession of said property until the date of his death; and my father paid taxes on all of the property I have described from the dates mentioned until the date of his death.

Q. You have stated that your father left five children as his own heirs at law to the above described property—will you state if any of the heirs mentioned have disposed of their interests since the death of your father? A. I purchased all the interest of my brother, William H. Rackey in the real estate that I have described and my mother, Lizzie Rackey, purchased all the interest of my brother, Maurice H. Rackey, in the property that I have described, so that said property is owned now by myself and Mary B. Darmstead, and my mother, Lizzie Rackey, and the defendant Emma L. Hilton, subject to the deed referred to in paragraph 8, of the bill of complaint, recorded in Liber 3249, at folio 494 of the Land Records of the District of Columbia.

Mr. MACKEY: I offer in evidence a deed from William H. Rackey to George E. Rackey, recorded May 13th, 1909, in Liber 2332, at folio 254, and a deed from Maurice H. Rackey to Lizzie Rackey, recorded on March 22nd, 1909, in Liber 3219, at folio 64 of the land Records of the District of Columbia — deed from William H. Rackey et al. to Lizzie Rackey, recorded in Liber 3249, at folio 494, and ask that they be marked as Exhibits.

NOTE.—Put in evidence and marked Exhibits E, F, and G.

Mr. PADGETT: Deed offered in evidence, objected to as incompetent immaterial and not pertinent to the issue.

Q. I will ask you if the property that you have described is capable of partition, that is to say, of division in kind between the heirs of your father according to their respective interests? A. The property is not capable of partition, or of division in kind, for the reason that it consists of parcels of land of different values, and it would have to be sold and the proceeds divided among the heirs entitled.

GEORGE E. RACKEY.

Subscribed and sworn to before me this 23 day of November, A. D., 1909.

WILLIAM H. SHIPLEY,
Examiner in Chancery.

14

EXHIBIT "G."

Filed November 24, 1909.

This agreement made this 11th day of July 1908, between William H. Rackey, Emma L. Hilton, Mary Bertha Darmstead, George E. Rackey and Maurice H. Rackey, the children and sole heirs of Henry Rackey, deceased as parties of the first part, and Mrs. Lizzie Rackey, the Widow of said deceased, as party of the second part, Witnesseth:

That the said parties of the first part do hereby authorize their Mother, the said Lizzie Rackey, to take charge of the real estate belonging to their said Father at the time of his death, and to collect the rents thereof, to rent the same out in a fair and usual way when any house becomes vacant, and to apply all rents she collects, as she is hereby required to do to the payment of all reasonable and lawful expenses of said real estate, including Taxes, Insurance, Water rents, and repairs, and out of the balance of said rents left after the payment of said expenses, she shall pay as follows:—

First. So much money each month as will be sufficient to fully pay the debts and burial expenses of said Henry Rackey deceased as the same now remain due and unpaid, but such payment of debts and burial expenses to be made fully within one year from the time this authority is to commence.

Second. And after the payment of the said debts and funeral expenses, to apply so much of said balance as remains for the comfort and support of said Lizzie Rackay, widow, [and what remains after such comfort and support are paid for, she shall divide equally among her said five children as often as maybe convenient.]*

15 This authority to have charge of said real estate, and to proceed as herein before authorized and directed, shall be good for one year on and from the 24th day of June 1908, and no longer, but, still subject to the further provisions herein as may be needed. And this agreement further witnesseth that by consent of all the parties hereto, that the said real estate shall be sold for

[* Words enclosed in brackets erased in copy.]

some fair and reasonable price and as a whole, [but for not less than Twenty Thousand Dollars.]* And that some fit person or persons may be employed by the said Lizzie Rackey, with the consent of at least three of said heirs, to assist or make such sale and upon usual charges. And all the parties hereto bind themselves to join in a good and valid Deed or Deeds to the purchaser or purchasers of said real estate, upon compliance on the part of such purchaser or purchasers with the terms of sale of such real estate. The purchase money arising from such sale after deducting all lawful expenses incident to such selling, or that may further be required to be deducted for any purpose hereinafter, shall be divided by giving one-third thereof absolutely to the said Widow, Lizzie Rackey, in full settlement of her Dower rights, and the remaining two-thirds shall be divided equally and in full right among the said five children and heirs. And any and all personal property left by the said Henry Rackey shall be the sole property of the said widow, except the horse, wagon, dog cart and all harness, which have been allotted to said George E. Rackey, and also excepting the house on the west side of the ground owned by the said Henry Rackey, the ground

16 under which was not claimed by him, but the building is to be sold as part of his real estate as aforesaid. The right to sell said real estate shall begin with the execution by all of this agreement, and if such real estate be sold and conveyed away before the debts and funeral expenses are fully paid, then the said Widow agrees to finish paying such out of her said one-third.

In Witness of all which said parties have hereunto set their respective hands and seals the date first hereinbefore written.

WILLIAM H. RACKEY.	[SEAL.]
EMMA L. HILTON.	[SEAL.]
MARY BERTHA DARMSTEAD.	[SEAL.]
GEORGE E. RACKEY.	[SEAL.]
MAURICE H. RACKEY.	[SEAL.]
LIZZIE RACKEY.	[SEAL.]

Signed, sealed and delivered in presence of
BEN C. McQUAY.

DISTRICT OF COLUMBIA, *To wit:*

I, Ben C. McQuay a Notary Public in and for said District, do hereby certify that William H. Rackey, Emma L. Hilton, Mary Bertha Darmstead, George E. Rackey, Maurice H. Rackey and Lizzie Rackey, parties to a certain agreement bearing date on the 11th day of July 1908, and hereto annexed, personally appeared before me in the District aforesaid, the said names parties being personally well known to me as the parties who executed the said agreement, and acknowledged the same to be their act and deed.

Given under my hand and Notarial seal this 11th day of July 1908.

Lines 5- 6- 7- 8- 19- and 20- on Page "2" were erased before signing.

[SEAL.]

BEN C. McQUAY.

Filed November 24, 1909.

In the Supreme Court of the District of Columbia.

* * * * *

Met pursuant to agreement, at the offices of Crandal Mackey, Esq., Columbian Building, No. 416 Fifth Street, Northwest, Washington, District of Columbia, on Wednesday, November 10th, 1909, at 3 o'clock P. M., on behalf of the defendant.

Present:

Crandal Mackey, Esq., Attorney for the complainants and
James E. Padgett, Esq., Attorney for the defendant.

Whereupon EMMA L. HILTON, the defendant, being first duly sworn according to law, to testify the truth, the whole truth and nothing but the truth relating to the cause at issue, was examined and testified as follows:

Direct examination.

By Mr. PADGETT:

Q. State your name and residence? A. Emma L. Hilton, and I reside at No. 3717 M Street, Northwest, Washington, District of Columbia.

Q. Mrs. Hilton, are you married? A. Yes, I am married.

Q. How long have you been married? A. I have been married 24 years.

18 Q. Are you the person named as defendant in this case?
A. I am.

Q. Are you acquainted with the parties who are named as the complainants in this suit? A. I am.

Q. What was your father's name? A. Henry Rackey.

Q. Is he the same person who is mentioned in this bill of complaint as the owner of this property? A. He is the same person.

Q. Do you remember when he died? A. He died the 23rd day of June, 1908.

Q. Where? A. No. 3729 M Street, Northwest, this City.

Q. Did he die testate or intestate? A. Intestate.

Q. Mrs. Hilton, please state what children he left surviving him?
A. He left five children.

Q. Did he leave a widow? A. He left a widow.

Q. Was his widow your mother? A. She was not my mother; I am the second child of my father by his first wife.

Q. What children did your father have by his first wife? A. He left two, a brother little older than myself, and myself.

19 Q. Name them? A. William H. Rackey, and Emma Hilton.

Q. What children did he leave by his second wife? A. He left

three—Maurice H. Rackey, George E. Rackey and Mary B. Darmstead.

Q. Now, are those five children, the only children that your father left surviving him? A. Yes.

Q. Did he have any other children? A. They died before they were grown.

Q. How old were they when they died? A. Small children.

Q. Then, the children that you have mentioned, are the only heirs at law of your father? A. Yes, they are the only heirs of my father.

Q. You have heard, as described by the witness George A. Rackey, a description of the property left by your father, have you not? A. Yes, I heard it described.

Q. Now did he leave that property when he died? A. He left that property to the best of my knowledge.

Q. Now, how long had your father, prior to his death, lived on a portion of these premises if you know? A. Upward of 27 or 28 years.

Q. You now live in one of the houses? A. I live there, yes; I have been a tenant for 22 years there.

EMMA L. HILTON.

20 Subscribed and sworn to before me this — day of November, A. D., 1909.

Examiner in Chancery.

Auditor's Report.

Filed September 22, 1910.

* * * * *

This cause was referred to the Auditor to state the account of the trustees and distribution of the fund. After due notice I proceeded with the reference, and the said accounts will be found stated in the Schedules hereto annexed, accompanied by the vouchers.

In Schedule A I have stated the account of the trustees, debiting them with the proceeds of sale and certain rents accounted for by one of the tenants in common; and crediting them with the costs of suit, advertisement of sale, auctioneer's fees, cost of sub-division, premium on their bond, their commissions, together with an extra allowance to them, and the cost of the reference. The extra allowance to the trustees is in the neighborhood of $\frac{3}{4}$ of one per cent and I regard the claim to the same as moderate, in view of the unusual amount of trouble they had in connection with the title and the sub-division of the property into salable parcels.

In Schedule B I have stated the distribution of the cash and the deferred payment notes. Lizzie Rackey, the widow, has acquired by deed the interest of one of the children, and George E. Rackey, one of the children has acquired by deed the interest of another. The distribution is made accordingly.

In the eighth paragraph of the bill it is alleged that the heirs at law conveyed by deed to the widow, in lieu of her dower, a one-third fee simple interest in the real property described and sold in this proceeding, and after reciting further conveyances by two of the heirs at law of their interests, one to the widow and one to another of the heirs, sets forth the interests claimed by the complainants by reason of these conveyances of interest. The bill is filed by two of the heirs at law now holding interests, and the widow, against one of the other heirs, now holding interest.

The defendant in her answer denied the allegation of the bill above stated, and avers that the provisions of the deed to the widow referred to, expired by limitations, and the consideration for the same failed. The issue raised by the bill and answer was argued at some length before me. It may serve to make clear the reason for this controversy if it be stated, as I am advised by counsel, though there is nothing in the record of the case to show it, that the defendant, Hilton, is not the child of the widow, being a half sister to the other heirs.

The determination of this question rests upon the construction of the so called deed which is Exhibit G attached to the testimony taken before the examiner in this cause. Upon examination of this
22 paper, it does not seem to be in the nature of a conveyance at all, but rather an agreement or family settlement. The argument of counsel for the defendant rests upon two grounds as practically set up in the answer, one the expiration of the agreement by its own terms, and the other, the lack of consideration. The first contention, it will be seen, upon examination of the agreement, falls to the ground; the limitation of the time referred to relates to the management of the property by the widow on behalf of all the heirs, and the application of the income, and not to any interest in the proceeds of the sale of the property. Moreover, by the concluding language of the limitation it expressly excepts therefrom the further provisions of the agreement with respect to the sale of the real property. The second contention of counsel is that the contract is an executory contract, and that by failure of the widow to make sale of the property, the consideration for the agreement failed. I have given earnest thought to this contention by counsel, and close study to the language of the agreement, and am not impressed by the claim. The agreement must be considered as a whole. On its face it is a family settlement, and the Courts are not prone to disturb a settlement of this kind except for very strong reasons. The entire trend of the decision is to hold them sacred and binding in every respect.

The agreement provided first that the widow is "to take charge of the real estate, collect the rents, and after the payment of all proper charges, to apply the balance to the debts and funeral expenses of her deceased husband for the period of one year, and after
23 the payment of the debts and funeral expenses, to apply any residue to her own comfort and support", the authority to have charge of the real estate, to be "good for one year, and no longer", but "still subject to the further provisions herein as may

be needed". The agreement then provides, "that by consent of all the parties hereto, the said real estate shall be sold for some fair and reasonable price and as a whole; and that some fit person or persons may be employed by the said Lizzie Rackey, with the consent of at least three of said heirs, to assist or make such sale, and upon usual charges" all parties binding themselves to convey. The agreement next provides that the purchase money arising from said sale, after deducting all lawful expenses, shall be divided by giving one-third to the "said widow, Lizzie Rackey in full settlement of her dower rights and the remaining two thirds shall be divided equally and in full right among the said five children and heirs". It then provides that the personal estate of the deceased should be the sole property of the said widow, except certain specified property which is allotted to one of the heirs by name. It then provides finally that if the real estate be sold before the debts and funeral expenses of the deceased be fully paid "then the said widow agrees to finish paying such out of her said one-third."

There is no executory consideration in this contract. The consideration from all parties was executed under mutual agreement for the settlement of the estate of their deceased husband and father respectively. The agreement that some one might be employed
24 by Lizzie Rackey, the widow, to make the sale of the property or to assist in making the sale is no more than the constituting of her as the agent of all the parties, and is not an absolute authority to her to make the sale, being conditioned that such employment shall be with the consent of at least three of the heirs. The agreement might by inference be said to give her the power of sale, but it does not do so directly and in terms, and in any event is not an absolute authority. Looking at the agreement as a whole, even if it was so, I am of the opinion that it is not a consideration in the agreement. There was a valuable consideration moving from the widow as may be noted, such as the relinquishment by her of her interest in the income of the property for the purpose of paying the debts of the deceased, and her relinquishment of certain specific portions of the personal property to one of the heirs. It may be that the considerations moving to the widow were more valuable than those moving from her, but that can have no weight, for it is well settled that the Courts cannot inquire into the adequacy of a consideration; they are limited to finding whether or not there was a valuable consideration, whether adequate or inadequate. On the whole the case presented does not warrant the setting aside of this family settlement of an estate. The distribution to the widow, therefore, is made in accordance with the terms of the agreement as to the interest therein assigned to her.

LOUIS A. DENT, *Auditor*.

Sept. 21, 1910.

25

SCHEDULE B.

Distribution.

Cash Distribution.

Balance from Schedule A.....		\$9,508.09
To		
Lizzie Rackey, one-third.....	3,169.36	
Lizzie Rackey, Grantee of Maurice H. Rackey. Deed recorded Liber 3219, Folio 64 of Land Records. One-fifth of two-thirds	1,267.74	
George E. Rackey. The same.....	1,267.74	
George E. Rackey, Grantee of William H. Rackey. Deed recorded Liber 3232, Folio 254 of Land Records. The same	1,267.74	
Emma L. Hilton. The same.....	1,267.74	
Mary B. Darmstead. The same.....	1,267.74	
Fractions	.03	
Totals	9,508.09	9,508.09

26

Distribution of Deferred Payments.

Notes due in one year:		
Principal, 1 at.....	1,108.00	
Interest	66.48	
		1,174.48
Principal, 3 at 342.00.....	1,026.00	
Interest	61.56	
		1,087.56
Total April 27, 1911.....		2,262.04

To

Lizzie Rackey, one-third	754.01	
Lizzie Rackey, Grantee, one-fifth of two-thirds	301.60	
George E. Rackey. The same.....	301.60	
George E. Rackey, Grantee. The same..	301.60	
Emma L. Hilton. The same.....	301.60	
Mary B. Darmstead. The same.....	301.60	
Fractions	.03	
Totals	2,262.04	2,262.04

Notes due in two years:

Principal 1 at.....	1,109.00	
Interest	133.08	
		1,242.08
Principal, 3 at 341.00.....	1,023.00	
Interest	122.76	
		1,145.76
Total April 27, 1912.....		2,387.84

27 2,387.84

To

Lizzie Rackey, one-third.....	795.94	
Lizzie Rackey, Grantee, one-fifth of two-thirds	318.38	
George E. Rackey. The same.....	318.38	
George E. Rackey, Grantee. The same..	318.38	
Emma L. Hilton. The same.....	318.38	
Mary B. Darmstead. The same.....	318.38	
Totals	2,387.84	2,387.84

Recapitulation.

Lizzie Rackey:

Cash	3,169.36	
Cash	1,267.74	
		4,437.10
Deferred Payments	754.01	
“ “	301.60	
“ “	795.94	
“ “	318.38	
		2,169.93
Total to her		6,607.03

George E. Rackey:

Cash	1,267.74	
Cash	1,267.74	
		2,535.48
Deferred Payments	301.60	
“ “	301.60	
28 Deferred payments	318.38	
“ “	318.38	
		1,239.96
Total to him.....		3,775.44

Emma L. Hilton:

Cash		1,267.74
Deferred Payments	301.60	
" "	318.38	
		<u>619.98</u>
Total to her		<u>1,887.72</u>

Mary B. Darmstead:

Cash		1,267.74
Deferred Payments	301.60	
" "	318.38	
		<u>619.98</u>
Total to her		<u>1,887.72</u>

Balance for distribution Schedule A		13,774.09
Interest on deferred payments	66.48	
	61.57	
	133.08	
	122.76	
		<u>383.88</u>
Total for distribution		<u>14,157.97</u>

To

Lizzie Rackey	6,607.03	
George E. Rackey	3,775.44	
Emma L. Hilton	1,887.72	
Mary B. Darmstead	1,887.72	
Fractions	.06	
Totals	<u>14,157.97</u>	<u>14,157.97</u>

LOUIS A. DENT, Auditor.

Filed September 24, 1910.

* * * * *

Now comes Emma L. Hilton, the defendant in the above entitled cause, by her attorney and excepts to the report, findings and conclusions of the Auditor, and the schedule accompanying the same filed herein September 22nd, 1910, and for cause shows the following:

No. 1. That the Auditor in hearing and determining said cause admitted in evidence and considered in making his findings, against

the objections of the defendant, the agreement of July 11, 1908, made by the parties to this cause, whereas the said Auditor should not have admitted in evidence or considered the said agreement, because the same was shown, by the bringing of this suit, to have become abandoned, and was incompetent, irrelevant and immaterial.

No. 2. That the Auditor in his findings, while holding that the conditions of the said agreement as respects the sale of the real estate involved were never performed, yet, nevertheless, he holds that the said agreement is in force and binding upon the parties, and that the plaintiff, Lizzie Rackey, is entitled to one third of the proceeds of the sale of the real estate made by the trustees herein, whereas, the Auditor should have found and held that the said agreement, by reason of the non-performance of its conditions as to the sale of the real estate, became abandoned and terminated, and that said Lizzie Rackey was not entitled to a one-third interest in said proceeds, but only to her dower interest therein.

30 No. 3. That the Auditor in, substance, finds that while the said agreement did not convey to said Lizzie Rackey any interest in the real estate, and notwithstanding that its provisions were not carried out, yet, it entitled said Lizzie Rackey to a one-third interest in the proceeds of the sale of the real estate made by the trustees, whereas, the Auditor should have found, said agreement not having been performed by said Lizzie Rackey, no sale having been made by her as provided by said agreement, and no proceeds of sale having been created, that said agreement became void, and the said Lizzie Rackey was not entitled under said agreement to any portion of the proceeds arising from the sale made by the trustees.

No. 4. That in the schedule showing the distribution of the moneys arising from the sale of said real estate the Auditor found that said Lizzie Rackey was entitled to and there was distributed to her one third of said moneys whereas, he should have found that she was entitled to and to have distributed to her of said moneys the amount provided and allowed her by law as the widow of the deceased intestate owner of the real estate, that is her dower interest, because, the record shows, that when Lizzie Rackey and the other plaintiffs brought this suit they thereby abandoned said agreement—that the real estate was never sold as provided by said agreement—that the proceeds of sale which said agreement directed to be distributed never *was* created or had any existence—that said agreement did not operate to vest in Lizzie Rackey or in the other parties any interest or estate in the real estate—that the agreement vested

31 in Lizzie Rackey a power of sale only, and a distributive share of the proceeds thereof, in the event that the powers should be exercised—that a distribution should be made only of moneys arising from sales made in pursuance of said agreement—that the conditions of said agreement were never performed—that the considerations for said agreement failed and no rights issued out of it—that when the agreement became void and inoperative the parties were relegated to their original rights under the law—that the defendant is entitled to one-fifth of the moneys arising from the

sale of said real estate after deducting the committed dower right of Lizzie Rackey.

That because of the above recited facts it was the duty of the Auditor to report, and he should have found and so reported, that the said Lizzie Rackey is entitled to her committed dower in the proceeds of the sale of said real estate, and that the defendant is entitled to one-fifth of said proceed- after deducting the said dower.

Wherefore, the defendant excepts to said report and schedule and prays judgment.

JAS. E. PADGETT,
Att'y for Defendant.

Decree Confirming Auditor's Report.

Filed October 13, 1910.

* * * * *

32 This cause coming on to be heard upon the exceptions to the report, findings and conclusions of the Auditor, and schedule accompanying the same, filed herein on September 21, 1910, was argued by counsel, upon consideration whereof, it is this 13th day of October, A. D. 1910, adjudged, ordered and decreed that the report, findings and conclusions of the Auditor, and the schedule accompanying the same be and the same are hereby ratified and confirmed.

ASHLEY M. GOULD, *Justice.*

The defendant Emma L. Hilton, by her attorney James E. Padgett, Esq., noted an appeal in open court, and upon motion bond on appeal was fixed by the court at fifty dollars.

ASHLEY M. GOULD, *Justice.*

Memorandum.

November 1, 1910.—Bond on appeal for \$50.00 approved and filed.

Designation for Record.

Filed December 15, 1910.

* * * * *

To the Clerk of the Court:

33 You will please certify to the Court of Appeals the following portions of the record in the case of Geo. E. Rackey v. Emma L. Hilton, Equity Cause No. 28881, viz:

1. The Bill.
2. " Answer.
3. " Deposition of Geo. E. Rackey
4. " " " Emma L. Hilton

5. " Exhibit "G" to testimony—(an agreement).
6. " Auditor's Report & "Schedule B".
7. " Exceptions to Auditor's Report.
8. " Decree & appeal.
9. " Memo. of bond.

Very respectfully,

JAS. E. PADGETT,
Att'y for Def't.

34 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 33, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 28881 in Equity, wherein George E. Rackey, et als. are Complainants and Emma L. Hilton is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of December, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2256. Emma L. Hilton, appellant, vs. George E. Rackey et al. Court of Appeals, District of Columbia. Filed Dec. 17, 1910. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

MAR--2-1911

Henry W. Hodgson
Hilton

In the Court of Appeals of the District of Columbia.

JANUARY TERM, 1911.

No. 2256.

EMMA L. HILTON, APPELLANT,

vs.

GEORGE E. RACKEY ET AL., APPELLEES.

BRIEF IN BEHALF OF APPELLANT.

JAS. E. PADGETT,
JOHN RIDOUT,
Attorneys for Appellant.

In the Court of Appeals of the District of Columbia.

JANUARY TERM, 1911.

No. 2256.

EMMA L. HILTON, APPELLANT,

vs.

GEORGE E. RACKEY ET AL., APPELLEES.

BRIEF IN BEHALF OF APPELLANT.

Statement of Case.

This is a suit to procure the partition by way of sale of certain real estate.

The appellees are children and the widow of one Henry Rackey, deceased; and the appellant is a child of said Henry but not of his widow. Said Henry died intestate, leaving the real estate involved herein.

The bill, which was filed by the appellees, alleges that all the parties are adults, and that said Henry died intestate on the 23rd day of June, 1908, leaving as his widow the plaintiff, Lizzie Rackey, and as his sole heirs at law the other parties to the cause. That George E.

Rackey, one of the plaintiffs, purchased the interest of his brother, William H. Rackey, and the said Lizzie purchased the interest of her son, Maurice H. Rackey, in said real estate, so that the same is owned in fee simple by the parties to the cause. That said real estate is improved by small dwelling houses of the assessed value of \$8,555.00 and of the real value of about \$15,000.00, and all but one of said dwellings are under rental, and that it will be necessary for the court to appoint some person to collect the rents, etc. That said real estate is not capable of partition in kind, and the same will have to be sold, and the proceeds divided among the parties according to their respective interests. That by deed dated July 11, 1908, and recorded July 22, 1909, in Liber 3249, folio 494 of the land records of said District, the parties to this suit, except the said Lizzie Rackey, together with William H. Rackey and Maurice H. Rackey, conveyed to the said Lizzie, in lieu of her dower, a full one-third fee simple interest in the said real estate; and the said Lizzie has since purchased the undivided interest of said Maurice, and the said George E. Rackey has purchased the undivided interest of his brother, William H. Rackey. That said real estate is owned by the parties to the bill in the following proportions: Lizzie Rackey, 7/15ths, George E. Rackey, 4/15ths, Mary B. Darmstead, 2/15ths and Emma L. Hilton, 2/15ths. The bill prays for process, a sale of the property and division of the proceeds between the parties according to their respective interests, and for general relief.

The answer admits that Henry Rackey was the owner of the property described; that he died intestate; that the relationship of the parties are correctly stated in the bill; that Lizzie Rackey purchased the interests of her son

Maurice, and that George E. Rackey purchased the interest of his brother William; that the real estate is not capable of partition in kind and should be sold. Replying to the eighth paragraph of the bill, the answer denies that by the alleged deed recorded in Liber 3249, folio 494, the appellant and the other persons named in said paragraph, conveyed a full one-third interest in said real estate to said Lizzie Rackey in lieu of her dower, and alleges that the provisions of said deed have expired by their own limitations, and that the considerations for making said deed, so far as the real estate is concerned, have failed; denies that appellant is entitled to only $\frac{2}{15}$ ths of said real estate, and avers that she is entitled to the full interest devolved upon her by the law.

Testimony was taken by the plaintiffs, and among the deeds offered in evidence was that recorded in Liber 3249, folio 494, and marked "Exhibit G" (Rec. 8). The appellant objected to the introduction of this deed (Rec. 7).

Upon the report of the trustees of the sale of the property, the cause was referred to the Auditor to state their account and distribution of the proceeds. The Auditor made his report holding that the widow, Lizzie Rackey, under the agreement, or, as the appellees name it, the deed, "Exhibit G," is entitled to one-third of the net proceeds of the sale and distributed said one-third to her (Rec. 11 and 14).

To the report and findings of the Auditor the appellant filed exceptions (Rec. 16). Upon hearing of the same the court, by its final decree, ratified and confirmed said report (Rec. 18). From which decree appellant duly appealed.

Assignment of Error.

1. *The court erred in overruling all and each of the exceptions of the appellant to the report, findings and conclusions of the Auditor.*

2. *The court erred in decreeing to the appellee, Lizzie Rackey, one-third of the net proceeds of the sale made by the trustees in these proceedings.*

3. *The court erred in holding that by virtue of the agreement, "Exhibit G," said Lizzie Rackey became vested with a one-third interest in the property involved.*

4. *The court erred in failing to find, and so decree, that the said Lizzie Rackey and the other appellees abandoned said agreement, and that the same became null and void so far as the sale of the real estate and the distribution of the proceeds are concerned.*

Argument.

These assignments of error can be considered together and under one head, viz:

That said agreement, Exhibit G, did not vest in said Lizzie Rackey a one-third interest in said real estate, or in the proceeds of the sale of the same made by the trustees in this cause.

By the terms of the agreement, so far as the appellant is concerned, all the personalty was given to said Lizzie Rackey, and the real estate was placed in her control to collect the rents thereof for one year and out of the same to pay the taxes, repairs, funeral expenses and debts, and the balance remaining to be hers absolutely.

The provisions providing for the sale of the property are as follows:

And this agreement further witnesseth that by consent of all the parties hereto that the said real estate shall be sold for some fair and reasonable price and as a whole, and that some fit person or persons may be employed by the said Lizzie Rackey, with the consent of at least three of said heirs, to assist or make such sale and upon usual charges. And all the parties hereto agree to join in a good and valid deed or deeds to the purchaser or purchasers of said real estate, upon compliance on the part of such purchaser or purchasers with the terms of sale of such real estate. The purchase money arising from such sale after deducting all lawful expenses incident to such selling, or that may further be required to be deducted for any purpose hereinafter, shall be divided by giving one-third thereof absolutely to the said widow, Lizzie Rackey, in full settlement of her dower rights, and the remaining two-thirds shall be divided equally and in full right among the said five children and heirs. * * * The right to sell said real estate shall begin with the execution by all of this agreement, and if such real estate be sold and conveyed away before the debts and funeral expenses are fully paid, then the said widow agrees to finish paying such out of her said one-third.

The evident object of this agreement was to have the property sold and the proceeds thereof distributed, and thereby avoid the expense and delay of resorting to the courts. It was an attempt to make a family settlement of the estate—a compromise agreement. The considerations of the agreement were :

1. As moving from the widow, that she would sell the property with the assistance of some agent, produce a purchase money fund, and out of the same pay expenses and distribute the proceeds.

2. As moving from the heirs, that they would unite in the necessary deeds of conveyance of the property which the widow should sell, and out of the money received therefor the widow should have one-third in settlement of her dower.

3. As moving mutually from all, that resort to the courts should be avoided, and the trouble, delay and expense, of litigation saved. (This, a legal inference.)

The undisputed facts are, that no sale was made in pursuance of this agreement; that no purchase money arose thereunder to be distributed as it provided; that no conveyance of the property was made as it contemplated; and that all the parties to the agreement in person or by representation, except the appellant, united in this bill praying for partition.

In the bill of complaint the appellee, Lizzie Rackey, bases her claim to the one-third of the proceeds of sale, which was awarded her, upon this allegation and none other, viz: that by said agreement the grantors therein "conveyed to the said Lizzie Rackey, widow of the intestate, Henry Rackey, in lieu of her dower, a full one-third fee simple interest in the real estate hereinbefore described."

Now this agreement and the indisputable facts show:

1. That there was no conveyance to Lizzie Rackey of any interest in the land.

The agreement itself provided that upon a sale of the property the parties of the first part would join in the necessary deeds to the purchasers. She was granted merely a power to dispose of the property.

"A power to dispose of land in the seizin of a third person is in no just sense an estate in the land itself."

Carver vs. Jackson, 4 Pet., 93.

2. That said agreement made Lizzie Rackey the agent of the other parties with power to sell the property; and by her failure to sell, and her uniting with the other appellees in bringing this suit for partition, her power to sell became exhausted.

“Where a power is given to be exercised for a particular purpose and such power has failed, or has been accomplished without the exercise of the power, the power is exhausted.”

22 Amer. & Eng. Ency. L., 1132 (2nd Ed.).

Daly vs. Jones, 8 Wheat., 495.

Such power may be revoked by bringing suit.

31 Cyc., 1299.

3. That when Lizzie Rackey and the other appellees instituted this suit and prayed the court for a partition, they abandoned the agreement, and the same thereby became void, and the parties were relegated to their original rights.

“When one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated, and demand whatever damages he has sustained thereby.”

Lovell vs. St. Louis M. L. Ins. Co., 111 U. S., 264.

Railway Co. vs. Richards, 30 L. R. A., 33.

A contract may be discharged by breach of one party, making it impossible that he can perform his promise, or by his totally or partially failing to perform his promise.

9 Cyc., 635.

Dingley vs. Oler, 117 U. S., 490.

4. That said agreement was an executory contract

providing that certain things should be done in the future in order that the parties should realize the benefits of its provisions.

Fletcher vs. Peck, 6 Cranch, 136.
9 Cyc., 244.

5. That the bringing of this suit for partition was not in any sense a selling of the property under the agreement, because the sale could be made only in the manner prescribed by said agreement.

Greenleaf vs. Queen, 1 Pet., 145.

6. That the claim made by the appellee, Lizzie Rackey, to one-third of the proceeds of the sale made by the trustees in this cause, is in the nature of a claim for specific performance of the agreement; and she having failed to perform the contract on her part, is not entitled to a specific performance in the particular prayed for.

The plaintiff who seeks for the specific performance of an agreement must show that he has performed or offered to perform, on his part, the acts which formed the consideration of the alleged undertaking on the part of the defendant.

Dorsey vs. Parkwood, 12 How, 126.
Purcell vs. Minor, 4 Wall., 513.

And where he fails to make such showing the contract cannot be enforced.

Jones vs. U. S., 96 U. S., 24.

7. Under the terms of the agreement Lizzie Rackey was to be paid one-third of the net proceeds arising from a sale made under said agreement; no "such sale" was

made, and no purchase money came into being, and hence there was nothing out of which she could be paid.

8. The agreement in this case being a compromise agreement, the appellees in order to enforce the same and entitle the widow to one-third of the proceeds of a sale of the property, must show that the terms and conditions of the agreement were performed and fulfilled.

"One relying on a contract of compromise and settlement calling for the performance by him of certain acts must show a performance of the conditions imposed upon him by such agreement."

Spofford vs. Brown, 95 U. S., 274.

Makepeace vs. Howard College, 10 Pick., 298.

8 Cyc., 534

Early v. Rogers 16 How 599

And upon his failure to do so, the other party may treat the agreement as a nullity and be remitted to his original claim.

8 Cyc., 535.

Playford vs. Playford, 4 Hare, 546.

Where a devisee of land which was charged with the payment of half its value to a daughter of the testator, agreed by way of compromise, to pay within a certain time a less amount, and upon such payment he was to be released from all liability on account of said charge upon the land, and he failed to pay the compromise sum within the time, *Held*, that the debt did not become merely a personal one, and the charge upon the land was not released by such agreement; and further that the devisee cannot take any benefit from such agreement since he has failed to comply with its terms.

Hunt vs. Wheeler, 116 N. Car., 422.

The testimony shows that the intestate was the owner of this property for more than twenty years (Rec. 11), receiving the rents therefrom. That all the children of intestate and Lizzie Rackey are adults not depending upon their parents for support. That the widow collected the rents for the year provided in the agreement. That within nine months after the date of the agreement the widow purchased all the interest of one of her sons (Rec. 7). That the interest of each heir, even after allowing the widow one-third of the proceeds of sale, is in the neighborhood of \$1,800. That there is no showing that the intestate left any debts other than funeral expenses. That all the personal property of the intestate was given to the widow absolutely; and all the rents for the first year after payment of taxes, debts, etc. That the appellant is not a child of the widow and therefore not her heir.

In consideration of all which it is respectfully submitted that the decree below should be reversed, the report of the Auditor set aside, a new reference ordered, with instructions that the appellee, Lizzie Rackey, be awarded her dower right only in the proceeds of said sale, and not one-third thereof.

JAS. E. PADGETT,
JOHN RIDOUT,
Attorneys for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

MAR.--6-1911

Henry W. Hodgins
Clerk

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1911.

No. 2256.

EMMA L. HILTON, APPELLANT,

vs.

GEORGE E. RACKEY ET AL., APPELLEES.

BRIEF IN BEHALF OF APPELLEES.

CRANDAL MACKEY,

Attorney for Appellees.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1911.

No. 2256.

EMMA L. HILTON, APPELLANT,

vs.

GEORGE E. RACKEY ET AL., APPELLEES.

BRIEF IN BEHALF OF APPELLEES.

Statement of Case.

Henry Rackey died intestate on June 23, 1908. He owned a number of houses and lots on the Canal Road in the District of Columbia. On July 11, 1908, eighteen days after the death of Henry Rackey, his widow and five children entered into the family settlement or family agreement following:

“This agreement made this 11th day of July, 1908, between William H. Rackey, Emma L. Hilton, Mary Bertha Darmstead, George E. Rackey, and Maurice H. Rackey, the children and sole heirs of Henry Rackey, deceased, as parties of the first part, and Mrs. Lizzie Rackey, the widow of said deceased, as party of the second part, Witnesseth:

“That the said parties of the first part do hereby authorize their mother, the said Lizzie Rackey, to take charge of the real estate belonging to their said father at the time of his death,

and to collect the rents thereof, to rent the same out in a fair and usual way when any house becomes vacant, and to apply all rents she collects, as she is hereby required to do to the payment of all reasonable and lawful expenses of said real estate, including taxes, insurance, water rents, and repairs, and out of the balance of said rents left after the payment of said expenses, she shall pay as follows:

"First. So much money each month as will be sufficient to fully pay the debts and burial expenses of said Henry Rackey, deceased, as the same now remain due and unpaid, but such payment of debts and burial expenses to be made fully within one year from the time this authority is to commence.

"Second. And after the payment of the said debts and funeral expenses, to apply so much of said balance as remains for the comfort and support of said Lizzie Rackey, widow.

"This authority to have charge of said real estate, and to proceed as hereinbefore authorized and directed, shall be good for one year on and from the 24th day of June, 1908, and no longer, but, still subject to the further provisions herein as may be needed. And this agreement further witnesseth that by consent of all the parties hereto, that the said real estate shall be sold for some fair and reasonable price and as a whole. And that some fit person or persons may be employed by the said Lizzie Rackey, with the consent of at least three of said heirs, to assist or make such sale and upon usual charges. And all the parties hereto bind themselves to join in a good and valid Deed or Deeds to the purchaser or purchasers of said real estate, upon compliance on the part of such purchaser or purchasers with the terms of sale of such real estate. The purchase money arising from such sale after deducting all lawful expenses incident to such selling, or that may further be required to be deducted for any purpose hereinafter, shall be divided by giving one-third thereof absolutely to the said widow,

Lizzie Rackey, in full settlement of her Dower rights, and the remaining two-thirds shall be divided equally and in full right among the said five children and heirs. And any and all personal property left by the said Henry Rackey shall be the sole property of the said widow, except the horse, wagon, dog-cart and all harness, which have been allotted to said George E. Rackey, and also excepting the house on the west side of the ground owned by the said Henry Rackey, the ground under which is not claimed by him, but the building is to be sold as a part of his real estate as aforesaid. The right to sell said real estate shall begin with the execution by all of this agreement, and if such real estate be sold and conveyed away before the debts and funeral expenses are fully paid, then the said Widow agrees to finish paying such out of her said one-third."

The foregoing family agreement was duly and formally executed under seal and acknowledged before the notary public who witnessed the signing and sealing of the instrument, and the same was then recorded as the deed of the parties in the office of the recorder of deeds.

More than fifteen months after the execution of said family agreement, the validity of which is unquestioned, the widow and two children brought suit for partition by sale of the real estate of the intestate, the appellant being the only defendant in the partition suit. Her answer admits all the averments of the bill, including the necessity for the sale of the property and division of the proceeds among those entitled. The answer of defendant denied that the widow had more than a dower interest under said family agreement, and said that the provisions of said agreement had expired by limitation, and that the consideration for making said agreement had failed. The questions of law raised by the answer were argued at length before the auditor who upheld the agreement as a family settlement

and made distribution in accordance therewith. The appellant filed exceptions to the auditor's report which were argued at length before Justice Gould who overruled these exceptions and confirmed the auditor's report.

ARGUMENT.

The deed under which the widow became entitled to one-third of the proceeds of sale of the real estate is a "family agreement," "family arrangement," or "family settlement." It was made upon sufficient consideration. All the heirs received something under the deed. Each one released his or her portion to all and all united in granting the widow a third and to each other an equal portion of the remaining two-thirds. There was the further consideration recognized by the books and the courts, the relationship of the parties, natural love and affection and the desire for family harmony. There was the further consideration that in event of the sale of the property before the funeral expenses and debts of the intestate were paid, the widow according to said agreement obligated herself to pay the same out of her one-third, making it thereby possible for the whole of the widow's third to be used in the payment of her deceased husband's debts. She further relinquished her right to one-third of the income in order to pay the debts and relinquished certain personal property and agreed that other personal property was to be sold as real estate. The agreement was subsequently ratified and confirmed by the distribution of the personal estate in accordance therewith, the management of the real estate by the widow, the collection of the rents and the renting of the property, the payment of taxes, insurance, water rents, and the burial expenses, and debts of the intestate out of said rents as specified in said agreement.

All the parties to the agreement were of full age and in all other respects *sui juris*. It is not claimed in the pleadings or the testimony that there was practiced by any person either fraud, misrepresentation, coercion, threats, violence, intimidation, duress, or deception, or that the appellant signed in ignorance of her rights, or that she was misled or did not know the effect of signing, or that there was imposition, undue influence, misplaced confidence, or want of knowledge on the part of anyone.

An examination of the agreement will show that there was no limitation as to the time in which the real estate was to be sold and no limitation upon the interest of the widow in the proceeds of sale. The agreement did not impose any duty or obligation upon the widow with respect to the sale of the real estate, but merely stated—

“that some fit person or persons *may* be employed by the said Lizzie Rackey with the consent of at least three of said heirs to assist or make such sale and upon usual charges.”

The agreement merely authorized the widow if she saw fit to act as agent for the heirs in *employing some person to sell the property*. Her authority as agent was limited to employing some person to make the sale, and this agency was further limited by requiring the consent of at least three of the heirs to the employment of such person. By the terms of the agreement all the parties consent to the sale of the real estate and that the money arising from said sale after deducting all lawful expenses should be divided by giving one-third to the widow and the other two-third divided among the heirs. The consideration was executed and the agreement in no respect executory or the widow's right to a third of the proceeds of sale contingent upon anything or the happening of any event. Her right to one-third of the proceeds of sale was fixed and absolute by the very terms of the family agreement. There were no conditions attached to the sale of

the property except that it was to be sold at a fair and reasonable price and as a whole.

The widow was not required to make the sale. All the parties to the agreement consented in the agreement to the sale of the property and all bound themselves to join in a good deed or deeds to the purchaser or purchasers. There were no conditions attached to the division of the proceeds of sale except that in event of a sale before the payment of the debts and funeral expenses of the intestate, the widow was to pay the debts and funeral expenses out of her third. No conditions of the agreement failed of performance.

An examination of the cases cited by counsel for appellant will show that the legal principles stated therein do not affect the interpretation placed on the agreement by the auditor. An analysis of the language of the agreement will show how inapplicable are the authorities cited by counsel for appellant to the facts of this particular case.

The following leading English and American cases fully sustain the action of the auditor:

“Family Arrangement: An agreement to dispose of property in a different manner to that which would otherwise take place. The mere relationship of parties will give effect to bargains otherwise without adequate consideration.”

Bouvier's Law Dictionary.

1 Chitty's General Practice, 67:

Tweddle *vs.* Tweddle, 1 Turner & Russell (English Chancery), 13.

Gordon *vs.* Gordon, 3 Swanstons Eng. Chancery, 400.

“Such an agreement will be upheld although there were no rights in dispute at the time of making it, and the court will not be disposed to

scan with much nicety the quantum of the consideration."

L. R., 2 English Chancery Appeal Cases, 294.

Drury & Warren's Irish Chancery Reports, 503.

"The impossibility of estimating money considerations in family arrangements has led to their exemption from rules which affect other arrangements."

7 Clark & Finnelly, 280 (English House of Lords).

"In ordinary cases a father's dealings with his child who has just come of age are open to suspicion and so are dealings with a reversioner, but if these are in the nature of a family arrangement the court will regard them not with suspicion but with favor."

2 Giffords English Chancery Reports, 232.

"Controversies for the settlement of family difficulties or family controversies if at all reasonable are especially favored both in equity and in law, and in such cases the courts will go further to sustain the same than they would under ordinary circumstances. The termination of such controversies is considered a valid and sufficient consideration for the agreement."

8 Cyc., 504.

"Especially if it be an agreement to settle family controversy. Such an agreement will not be considered voluntary and without consideration but will be enforced in equity as a fair family arrangement independent of its being a compromise of doubtful rights."

Watkins *vs.* Watkins, 24 Ga., 402.

Smith *vs.* Smith, 36 Ga., 193.

"Even if the settlement was not founded on a good pecuniary consideration it might be viewed

as a family settlement and as such it should be sustained and upheld in a court of equity."

Hurlbut vs. Phelps, 30 Conn., 50.

"An ignorance of law and a consequent mistake as to title founded upon such ignorance furnishes no ground to rescind agreements or to set aside solemn acts of parties when they have been made with full knowledge of the facts. Agreements embodying family compromises are upheld with a strong hand, and an equity has been administered in regard to them which has not been applied to agreements generally, upon the ground that the honor and peace of families make it just and proper to do so."

Trigg vs. Read, 5 Humphreys (Tenn.), 529.

"She then executes the deed and acknowledges it in a deliberate manner before a proper officer. Such a deed free from fraud, though a voluntary one yet made with a view of effecting a family settlement, a court of equity will seek to uphold rather than destroy for obvious reasons of public policy as well as for the sake of peace in families."

Cruger vs. Douglas, 4 Edwards Chancery Reports, 553.

"An agreement entered into upon a supposition of a right or of a doubtful right though it afterwards comes out that the right was on the other side, shall be binding and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other."

Stapilton vs. Stapilton—White & Tudors
Leading Cases in Equity.

See 172 Pa., 104.

23 S. W. Rep. (Tenn.), 72.

9 Sergeant & Rawles Reports (Pa.), 268.

Bunn vs. Bartlett, 8 N. Y. Supplement, 160.

Respectfully submitted.

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